ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

No. 211.

CHRISTOPHER CAMMACK, JR., APPELLANT,

vs.

MARGARET F. LEWIS.

FILED APRIL 4, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 211.

DECEMBER TERM, 1872.

CHRISTOPHER CAMMACK, JR., APPELLANT,

vs.

MARGARET F. LEWIS.

It is agreed that the bill originally filed in this cause was in the name of Mrs. M. F. Lewis, in her own right and as natural guardian of her children, and was amended as it now reads by consent of counsel.

THOMAS J. DURANT,
For Appellee.

T. T. CRITTENDEN,
For Appellant.

Filed 4th April, 1873.

Supreme Court of the United States.

CHRISTOPHER CAMMACK, Appellant,
vs.
MARGARET F. LEWIS.
} *No.* 211.

Brief of Counsel of Appellee on Motion to Dismiss.

Neither the decree of Judge MacArthur, at special term, (Record, page 42,) nor the decree in general term, affirming the former, (Record, page 43,) is a final judgment, from which an appeal will properly lie.

Pepper *vs.* Dunlap, 5 Howard, 51.

Winn *vs.* Jackson, 12 Wheaton, 135.

We pray your Honors to dismiss the appeal at the costs of the appellant.

Respectfully submitted.

THOMAS J. DURANT,
A. McCALLUM,
Counsel for Plaintiff and Appellee.

Supreme Court of the United States.

CHRISTOPHER CAMMACK, JR., vs. MARGARET F. LEWIS. } No. 211.

MOTION TO DISMISS APPEAL.

The question in controversy was, whether a note for $3,000 and a policy of insurance held by the appellant were his absolute property or merely security for a debt. The court below decided that they were merely security, and decreed that the proceeds of the policy should be paid over to the appellee, less the actual indebtedness of J. E. Lewis, deceased, to said Cammack; the ascertainment whereof was a mere matter of computation. As soon as the auditor's report on said indebtedness should be made and confirmed, the complainant below, without any further decree, might have had his execution for the amount decreed.

The decree, therefore, substantially disposed of the whole matter in controversy, leaving nothing open except a matter of simple calculation.

Such a decree is final, and cannot be appealed from.

See Whiting *v.* Bank United States, 13 Pet., 6.

Forgay *v.* Conrad, 6 How., 201.

Brunson *v.* La Crosse R. R. Co., 2 Black, 524.

W. S. Cox, T. T. Crittenden

For Appellant.

IN THE

Supreme Court of the United States

CHRISTOPHER CAMMACK, JR., *Appellant,*

vs.

MARGARET F. LEWIS.

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF COUNSEL OF APPELLANTS.

IN THE

SUPREME COURT OF THE UNITED STATES.

CHRISTOPHER CAMMACK, JR., *Appellant*,
vs.
MARGARET F. LEWIS
} No. 211.

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF COUNSEL OF APPELLANTS.

The appellee filed her Bill in Equity in the Supreme Court of the District of Columbia on the 13th of November, 1869, against the appellant and the Mutual Life Insurance Company of New Jersey.

The complainant therein, Rec. p. 1, alleged that she was the widow and administratrix of John E. Lewis, deceased and the guardian of William C. Lewis and Margaret W. Lewis, his children; that said John E. Lewis in his lifetime, was indebted to said Cammack in the sum of $70, and at the instance and request of said Cammack, said John E. Lewis, on the 19th of June, 1868, had his life insured in said Mutual Insurance Company for $3,000; that said John E. Lewis at the date of said policy of insurance assigned the same to said Cammack to secure the payment of said debt: that on the 9th of January, 1869, said John E. Lewis died and said Cammack undertook the settlement of the insurance, procured from the said

complainant a certificate of the justice of the claim, &c., (which she gave because she knew of the debt due him from her husband,) filed his own affidavit and received the full proceeds of said policy, $3,000; that said Cammack paid to said complainant, $950, but refused to pay any further sum and accounted for the proceeds as follows:

July 5, 1869, said note for.....	$70 00
" " receipted account for.....	26 35
Certificate of indebtedness for	3000 00

The complainant further averred, that the affidavit of said Cammack and said certificate of indebtedness, were false and fraudulent, and that the total debt of said John E. Lewis to him was only $96.35, and charged said Mutual Insurance Company with notice that the sum claimed and affidavit made by said Cammack were false and fraudulent.

The defendant, Cammack, Rec. p. 6, demurred to the bill because: 1st, said complainant has not exhibited by her bill, that she has duly administered or taken out letters of administration on the estate of said John E. Lewis, deceased; and 2d, said bill shows that the said William C. Lewis and Margaret W. Lewis are infants under the age of twenty one years and exhibited in said bill, without any person therein named as his, her, or their next friend.

Which demurrer was, on the 20th of December, 1869, overruled by the court.

The Defendant, Cammack, answering said bill, says, that he and the deceased, John E Lewis, were intimate friends; that said Lewis was indebted to him in said sums of $70 and $26.35, and in the further sum of $36. That he advised said Lewis to have his life insured and proposed to pay the premiums for a term of seven years if said Lewis would assign his policy, when obtained, to said defendant, in payment of said debts and for the further con-

sideration that said defendant would also pay out of the proceeds of said policy, when realized, one third part thereof to the widow of said Lewis.

The policy was obtained, assigned to, and the premium paid thereon by the defendant, and at its date said Lewis executed his note to said Cammack for $3,000 subject to a trust for the benefit of the complainant as to one-third thereof; that said Lewis died within one year after said policy was obtained; that said assignment and note were for a valuable consideration and binding upon all persons claiming under said Lewis; that defendant's claim and affidavit thereto were true and not fraudulent, and the said Insurance Company thereupon paid said $3,000 less the discount, for cash payment to the defendant; that he, as a friend of said Lewis, paid the premium upon another policy for $2,500, in a different company, upon the life of said J. E. Lewis, which was about to be surrendered because he was unable to pay said premium; which last sum so insured the complainant subsequently collected; that defendant paid to said complainant the one third of said $3,000 which he held in trust for her under the contract of September 15, 1869, in full settlement of her interest therein. The defendant further avers, that the complainant has no interest or title in her own behalf in the subject matter of this suit to maintain this cause without letters of administration.

The answer of the New Jersey Mutual Life Insurance Company, admits the policy was issued on the 18th of June, 1868, for $3,000, as stated in the bill; also admits that J. E. Lewis, with the consent of the company did, on the 19th of June, 1868, assign the policy of insurance to the defendant, Cammack, and admits the death of Lewis and the payment of the policy to Cammack, Jr., assignee in accordance with the terms of the policy.

General replications were filed, and on the 15th of Jan-

uary, 1870, leave was granted to said New Jersey Mutual Life Insurance Company, to file a cross-bill, making said Margaret F. Lewis and Christopher Cammack, Jr., parties defendants; and on the 17th of January, 1870, the cross-bill was filed, setting forth substantially that said insurance policy was a wager policy.

The said defendant, Cammack, answered said cross-bill substantially, as is set forth in his answer to the original bill filed by Margaret F. Lewis, and said Lewis answered the same by reiterating the allegations set forth in her bill.

After general replications filed, testimony was taken for the complainant, Lewis, alone.

This cause coming on to be heard by the chancellor at a special term of the court, the following decree was passed. Upon consideration thereof, it is ordered, and adjudged and decreed as follows:

1. That the bill as against the New Jersey Mutual Life Insurance Company, be dismissed.

2. That the cross-bill filed by said company be dismissed.

3. That the promissory note for $3,000, dated June 19th, 1868, was made by J. E. Lewis, (deceased,) and delivered with the assignment of policy No. 2885, issued by the New Jersey Mutual Life Insurance Company, on the life of said Lewis, to said Cammack as security for the payment of the indebtedness due by said Lewis to said Cammack at the date thereof.

4. That the cause be referred to W. S. Cox, auditor, to determine the amount owing by said Lewis to said Cammack, including the premium, if any, paid by him on said policy of life insurance.

5. That the money paid by said company on said policy, No. 2885, to said Cammack was, and is, the property of said plaintiff, and that said Cammack pay over the same

to said plaintiff, with interest from the time he received the same, after deducting therefrom the amount already paid and the amount of indebtedness and premium paid as shall be determined by said auditor report and the confirmation thereof by the said court, and that each party pay their own costs. Rec. p. 42.

From this decree the defendant, Cammack, appealed to the court in general term, by which said decree was affirmed. Rec. p. 43.

The decree herein is erroneous because it decided:

1. In favor of the right of the plaintiff, Margaret F. Lewis to sue in this cause in her own right and without administration on her husband's estate.

2. That the promissory note and assignment of the policy of June 19, 1868 of said J. E. Lewis was only a contract of security for the indebtedness of said Lewis to the appellant.

3. That the contract between the appellant and said J. E. Lewis, dated September 15, 1868, was null and void.

4. That there was no valid settlement, after the death of said J. E. Lewis, between the parties to this cause.

The plaintiff below alleges, "1st. That she is the widow of and administratrix of John E. Lewis, deceased, and the guardian of William Chandlee Lewis and Margaret Woodburn Lewis, his children." Rec. p. 1.

The Defendant, Cammack, demurs to said Bill for the cause that the complainant "has not exhibited by her said Bill that she has duly administered or taken out letters of administration on the estate of said Lewis, deceased." Rec. p. 7.

Said Defendant in his answer to said Bill avers "that the complainant has no interest or title in her own behalf in the subject matter of this suit, to maintain this cause, without letters of administration." Rec. p. 9.

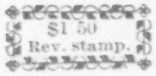
The plaintiff in her testimony says "that she has not administered upon the estate of J. E. Lewis, her late husband, but brings this suit in her own right." Rec. p. 40.

The policy of insurance did not specify that it was made for the benefit of the wife or children of the insured, therefore this suit can be maintained only by establishing some specific trust in favor of the said Mrs. Lewis. Harrison *vs.* McConkey, 1 Md. Chy., 34. Such trust did exist under the contract of Sept. 15, 1868 (Rec. p. 18,) but was fully executed and satisfied by payment in full to the appellee.

An administrator should have been appointed and the defect of parties is fatal to the relief herein demanded, and further, relief cannot be granted on a case not stated by the bill, but for the first time, made by the answer; Jackson *vs.* Ashton, 11 Peters, 249; Knox *vs.* Smith, 4 How, 298, or set up by the proof, Forsyth *vs.* Clarke, 3 Wend, 637.

2. Did Cammack hold the policy of insurance as a mere security for the indebtedness of John E. Lewis or as owner by virtue of a valid contract made for a valuable consideration?

It was clearly a case of mixed pecuniary interest and personal friendship. Lewis was and had been for some time in embarrassed circumstances; Cammack was his friend to whom he frequently applied for help, and who as a friend and creditor suggested that Lewis should obtain a policy upon his life; the contract finally agreed upon was just to all parties and is as follows.



Washington, D. C., June 19th, 1868

Due Christopher Cammack, Jr., the sum of three thousand dollars, value received, secured by assignment of policy of life insurance, No. 2885, in the New Jersey

Mutual Life Insurance Company, and payable at my death, from the proceeds thereof, to his order.

(Signod,) J. E. LEWIS.

Witness:

(Signed,) JAMES GRIFFITH,

(Signed,) C. SCHMIEG, Rec. p. 29.

WASHINGTON, D. C., *September 15th*, 1868

This agreement witnesseth that I, the undersigned, for value received, do bind myself and heirs or legal representatives to pay unto Maggie F. Lewis, wife of John E Lewis, her heirs and assigns, the sum of one thousand dollars, in event of the said John E. Lewis' death, the said amount being first realized by me from an insurance on his the said Lewis' life, duly assigned to and held by me, otherwise this agreement to be held null and void. No. of the policy 2855 in the New Jersey Mutual Life Insurance Company.

(Signed) C. CAMMACK, JR., [Seal.]

Witness: JAMES GRIFFITH,

C. SCHMERG, Rec. p. 25.

As security to the extent of $100 such a contract would have proved the appellant void of understanding, but, when connected with his warm personal friendship towards Lewis and a fair provision for his widow out of the proceeds, it is such a contract as men may make and courts approve.

The appellant also advanced $50 to pay the premium upon another policy for $2,500 upon the life of John E. Lewis in the Massachusetts Mutual Life Insurance Company and in which the appellant had no interest.

The insurance for $3000 was made by John E. Lewis in his own name, and he assigned it to said Cammack upon the terms above stated. There seems to be no reason why he should not give or convey the benefit of his interest to any other whom he might select. 20 New York, (6 Smith) 32. The assured had the same legal right to give, devise, or sell his interest in the policy as in any other personal property belonging to him. St. John *vs.* Amer-

ican Life Ins. Co., 13, New York, (3 Kern) 31. Ashley *vs.* Ashley, 3 Simms 149. Walton *vs.* National Loan Fund Life Insurance Society, 22 Barb 9, and St. John *vs.* American Mutual Life Ins. Co., 2 Duer, 419. It was a sale by J. E. Lewis to said Cammack in writing, as fully appears by the assignment of the policy, the due bill for $3,000 and the declaration of trust, &c., of September 15, 1868.

2 Kent, side page 468.

Williamson vs. Berry, 8 How., 544.

A transfer of the policy by consent of the company, is a new and independent contract with transferee. 7 Barb, 573, 1 Sel. 405, 3 Met. 69, 16 Barb. 254, 5 Fost, 207.

As to the effect and validity of contract where one is insured and another pays the premium, see Clark by his Guardian *vs.* Durant, 12 Wis. 223. There is no evidence of fraud and it is positively denied in the answer. Parker *vs.* Phetteplace, 1 Wallace, 684.

3. The contract, Rec. p. 25, between John E. Lewis and the appellant, was decided to be null and void by the court below, upon hearsay evidence alone and this evidence was duly excepted to at the proper time, as will appear by the Record pp. 19, 24, 30, 35, 38, 39.

4. After the decease of John E. Lewis, the appellant collected $3000 upon the policy of insurance assigned to him. He was assisted in collecting it by the appellee and and her agent W. E. Chandlee, and after collecting it a full and final settlement was made between the parties as appears from the Record pp. 23 to 29, according to the terms of the contract of Sept. 15, 1869, Rec. p. 18.

This settlement according to the weight of testimony was fairly made by both parties with a full knowledge of all the facts. The only witnesses testifying to this settlement are W. E. Chandlee Rec. pp. 23 to 29, and the appellee, Rec. pp. 38 to 40.

T. T. Crittenden,
W. S. Cox.
Of Counsel for Appellant.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1872.

No. 211.

CHRISTOPHER CAMMACK, Jr., Appellant,

VS.

MARGARET F. LEWIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief of Counsel of Appellee.

A. McCALLUM, WASHINGTON, D. C.,
THOMAS J. DURANT, WASHINGTON, D. C.,
OF COUNSEL.

WASHINGTON, D. C.
W. H. MOORE, PRINTER, 511 ELEVENTH STREET.
1873.

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

No. 211.

CHRISTOPHER CAMMACK, Jr., APPELLANT,

vs.

MARGARET F. LEWIS.

Brief of Counsel of Appellee.

It appears that the suit was originally brought by complainant in her own right, the language of the bill being, "That she is the widow of John E. Lewis, deceased, and the natural guardian of William Chandlee Lewis, and Margaret Woodburn Lewis, his children."

That complainant did not administer on the estate of Lewis until July 26, 1870, subsequent to the demurrer of defendant, Cammack, 1869, and to his answer, January 4, 1870, and also to the taking of testimony on behalf of complainant, which was filed July 20, 1870.—(Rec., p. 19, fol. 56½, (1871 an error.)

That prior to the hearing of the cause in special term, March, 1871, an agreement was made between counsel with consent of court, and the bill of complaint was amended accordingly as appears, by stipulation, in this.

The answer of the N. J. Mutual Life Insurance Co.; the Cross-Bill, and all doings thereunder, and the testimony led by complainant against said company, were not read in the hearing of the cause.

From the Record it appears that Lewis, deceased hus-

band of appellee, and the appellant, Cammack, were intimate friends.—(See Rec., p. 8, fol. 23.)

That Lewis was indebted to Cammack in a small sum—a note for $70.00, &c.

(See Rec. p. 1, fol. 4, and p. 8, fol. 23.)

That at the suggestions of Cammack, Lewis took out a policy of insurance on his life in the New Jersey Mutual Life Insurance Company for $3,000.00, and assigned it to Cammack, as complainant alleges, to secure the payment of said note for $70.00.—(See Rec., p. 2, top.)

As defendant alleges, "*in payment of said indebtedness*," to wit, the note for $70.00, an account of $26.35, and a further sum of $36.00.—(See Rec., p. 8, fol. 23.) The note for $70.00 is set forth in bill.—(See Rec., p. 1, bot.) It is the only debt proved to exist at the date of the assignment. The account for $26.35 set forth in defendant's answer was put in evidence, marked Exhibit "C," from which it appears that the debt was incurred November 2, 1868. It does not appear what the item of $36.00 was for or when contracted. The assignment was made June 19, 1868.—(See Rec., p. 12, fol. 37.)

The note for $70.00 was retained in the possession of defendant until February 5, 1869, (see Rec., p. 39, fol. 119,) when it was brought to appellee by the witness, Chandlee, with Exhibits C. and J., G., to wit: The account for $26.35 and due bill for $3,000.00; the account receipted and the notes endorsed satisfied February 5, 1869, by C. Cammack, Jr.—(SeeRec., p. 3, fol. 8.)

That the note for $3,000.00, dated June 19, 1868, as admitted by defendant, was made without consideration further than to vest the whole proceeds of the policy in Cammack, subject to a trust for the benefit of appellee. (See Rec., p. 8, fol. 24.)

That the alleged trust, according to appellee's statement, was "in case Lewis should die before said note was paid,

($70.00 note,) then that said Cammack should deduct the amount thereof and interest from the proceeds of policy of insurance, and pay over the balance to this complainant." (See Rec., p. 1, bottom, and p. 2, top.)

Appellant's statement limits the trust to one-third part of the proceeds of the policy. (See Rec., p. 8, fol. 24.)

It appears that there is no legal proof regarding this trust or the agreement made between Lewis and Cammack at the date of the assignment. (See Rec., p. 24, fols. 72 73, and p. 30, fol. 91.)

Appellant produces an obligation on his part to pay $1,000.00 to complainant out of the proceeds of the policy, (see Rec., p. 25, fol. 74,) and alleges that Lewis (deceased) accepted such agreement before making the assignment. (See Rec., p. 8, fol. 24.)

The assignment is dated *June 19th*, 1868. (See Rec., p. 12, f. 37.)

The obligation to pay $1,000.00 is dated *September* 15, 1868. (See Rec., p. 25, f. 74.)

Lewis died on 9th of January, 1869. (See Rec., p. 28, fol. 83.)

To procure the money from the insurance company appellant drew up a statement for the widow to sign, and employed witness, Chandlee, to procure her signature thereto. (See Rec., p. 25 bottom, and 26 top.)

The certificate makes no reference to any specific amount as due to Cammack from Lewis. It is signed by appellee under the impression that it referred to the debt of $70.00, as she knew of no other debt due Cammack. (See Rec., p. 38, bottom.)

She relied on the friendship and honor of appellant at the time, and did not suspect any fraud on his part. (See Rec., p. 16, fol. 48.)

The certificate J. E. L. is dated January 20, 1869. (See Rec., p. 26, fol. 77.) Three days afterwards appellant makes oath "that the full and true sum of $3,000.00 was

and is now due to me from said Jno. Ewd. Lewis or his estate." (See Rec., p. 26, fol. 78.)

Appellant attaches the certificate procured from the widow to this affidavit made by him, and, on this evidence of interest, received the money from the insurance company. (See Rec., p. 5, fol. 15, 15.)

After obtaining the money from the insurance company Cammack ~~Chandlee~~ draws the following check:

No. 459. WASHINGTON, D. C., *Feb.* 5, 1869.

NATIONAL METROPOLITAN BANK,

(Late Bank of the Metropolis,)

Pay to Mrs. John E. Lewis, or order, nine hundred and fifty dollars.

$950.00. C. CAMMACK, JR.

In full for her proportion of policy No. 2885, in the New Jersey Mutual Life Insurance Co.

And endorsed on back as follows: Mrs. J. E. LEWIS.

Which he pleads in bar of all further claim on the part of appellee. (See Rec., p. 9, fol. 27.) The check, as actually drawn, had the alleged receipt in full inserted in the lower left hand corner, as above.

The appellee did not have possession of this check. (See Rec., p. 39, top.) It was not read to her. She only saw the back of the check. She did not see the face of it. (See Rec., p. 39, fol. 118.)

Chandlee thinks he gave her the check at her house, but does not think he read it to her. He went to the bank with her and transacted her business for her. (See Rec., p. 27, fol. 80, and p. 39, top.)

The only questions arising in the record are—

1st. Whether the assignment of the policy was given as security for the payment of the just debt due by Lewis to Cammack or to make him full owner of the policy.

2d. Whether the payment by Cammack of $950.00 to the widow of Lewis, under the circumstances, was such an accord and satisfaction of her rights, and those of her children, as estops her from claiming the remainder in this suit.

ARGUMENT.

There is no error in the decree appealed from.

1. The Court did not, as appellant's brief says, decree "in favor of the right of the plaintiff to sue in this cause in her own right, and without administration of her husband's estate." (See appellant's Brief, p. 5.)

By agreement of counsel and consent of Court, the fact of administration was admitted, and the bill amended so as to read as now presented in the record. See Bill, transcript p. 1.)

2. The decree was right in treating the assignment of the policy to Cammack as a mere security. The appellant himself treated it as a security. He retained the overdue note for $70 in his possession unsatisfied, and the account for $26.35, as an open account until he had collected the proceeds of the policy of insurance and reimbursed himself therefrom. The assignment could not, therefore, have been given *in payment* of the indebtedness, because the debt was not, in fact, paid by the assignment, but out of the fund secured by the assignment. The assignment must have been given as collateral security, the act of the appellant in retaining the evidence of the debt in his own possession unsatisfied, until marked satisfied by the proceeds of the policy, shows that he so considered it. Cammack's claim is against all conscience, for he avers that Lewis only owed him about $100, for which he claims about $2,000, for his friendly act(?) in securing himself against loss.

To constitute a *bona fide* purchaser for a valuable consideration, the sale must be for a new consideration, and

the transfer of property merely as a new security for old debts and liabilities, without extinguishment or surrender of such debts, or of the old security therefor, is not sufficient.

Morse *vs.* Godfrey, 3 Story, 365.

A insured his life for $2,000, and made two payments on same. He then assigned the policy to B as security for a debt, and B thereafter paid the premiums regularly until the death of A, and then collected the insurance. He claimed the right to the whole amount of this money. A's widow and children also claimed the whole, disputing the legality of the assignment. *Held* that the assignment was legal, but that B was entitled to no more than was sufficient to pay the debt of A and reimburse B in the amount of premiums paid; and the rest belonged to the widow and children.

Rison *et al. vs.* Wilkinson & Co., 3 Sneed, 565, Sup. Ct., Tenn., 1856.

The decree in this case is in strict accord with this decision.

3. The appellant styles the paper dated Sept. 15, 1868, Exhibit C. C., Jr., (see Rec., p. 25,) a contract between the appellant and J. E. Lewis, the deceased. It is nothing of the kind. It is not signed by Lewis. It acknowledges that Cammack was to pay $1,000.00, but it does not prove that he ought to pay no more. It is first set forth in defendants answer to cross bill. (See Rec., p. 18, fol. 54.)

It is in the handwriting of Cammack. It is not properly identified as the paper found amongst the papers of the deceased in Chandlee's possession. (See Rec., p. 25, fols. 74 and 31, fol. 94.)

It was never submitted to appellee for approval, and was never seen by her until she testified in this case. (See Rec., p. 29, fol. 86, and p. 39, fol. 120.)

The Court below declared it void as a contract, for lack of mutuality, and the decree very properly treated it as good for nothing.

Whenever a contract is not binding on both parties at the time when made, the contract is void.—(*Chitty on Contracts, p.* 14.)

An agreement intended as a substitute for an existing agreement between the same parties, was drawn up and sent to one of the parties who approved of it and promised to execute it, but it was not executed, and was held inoperative for the want of consideration and mutuality.—(*Woods vs. Edwards*, 19 *John*, 205.)

There is no proof whatever that Lewis accepted this obligation in satisfaction of his equitable right in the policy.

4. The pretended settlement after the death of Lewis with his widow, who knew nothing of his affairs, and who trusted implicitly in appellant and Chandlee, was a fraud and a surprise.

Cammack concealed all knowledge of the note for $3,000.00 (Exhibit J. G.) until after he had received the money. His friend and agent, Chandlee, had never seen or heard of it before. (See Rec., p. 29, fol. 86.) Mrs. Lewis did not know of such a paper. (See Rec., p. 39, fol. 120.) When it was sent to her she wrote to Cammack asking why he had represented that Mr. Lewis owed him $3,000.00 instead of $70.00. (See Rec., p. 38, top.)

With regard to the payment of the check for $950.00, she says she never read it or saw the face of it. She did as she was told to do. Chandlee told her to put her name on it, as it lay on the desk in the bank, back upwards, and she did so. (See Rec., p. 39.)

This transaction was treated by the Court below as a fraud and a surprise. It was justly so treated, and the decree ought to be affirmed.

Where a party conceals a material fact peculiarly within

his own knowledge, or uses a device which is calculated to induce the other to forego inquiry into a material fact upon which the former has information, although such information be not exclusively within his reach, and it is shown that the concealment or other deception was practiced with respect to the particular transaction, such transaction will be void on the ground of fraud. (*Chitty on Contracts, page* 753, *and authorities there noted.*)

The Court will notice the fact that Cammack did not present himself as a witness to support by his deposition his extraordinary demands. Was not this because he did not dare to do so?

Respectfully submitted.

A. McCALLUM,
THOMAS J. DURANT,
Of Counsel.

APRIL 7, 1873.

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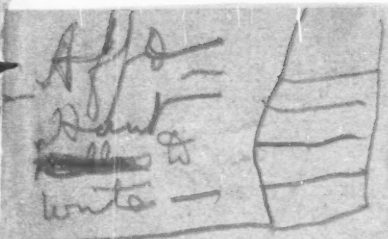

Judge Davis —
Heard
March 11 —
1872

11 Annual
63

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~887.~~ 155

THE NEW ORLEANS, MOBILE, AND CHATTANOOGA RAILROAD COMPANY, NOW CALLED THE NEW ORLEANS, MOBILE, AND TEXAS RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN HANNING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 18, 1871.

Dec. 1. 1871

SUPREME COURT OF THE UNITED STATES.

No. 387.

THE NEW ORLEANS, MOBILE, AND CHATTANOOGA RAILROAD COMPANY, NOW CALLED THE NEW ORLEANS, MOBILE, AND TEXAS RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN HANNING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition	1	1
Citation	3	1
Marshal's return	4	2
Answer	5	2
Peremptory exception	5	2
Hearing and continuance	7	3
Note of evidence	8	4
Order continuance	9	4
Submission of cause	10	4
Mistrial	11	5
Hearing and continuance	11	5
Note of evidence	12	5
Cause submitted	13	6
Bill of exceptions	14	6
Joint resolution of general assembly	25	10
Exhibit "A"	26	11
Exhibits B and C, (2 maps)	28	11
Verdict	29	12
Judgment	30	12
Petition and order for writ of error	30	12
Bond for writ of error	32	13
Clerk's certificate	35	14
Writ of error	36	14
Citation	38	15

1 United States circuit court for the fifth judicial circuit and district of Louisiana.

JOHN HANNING
vs.
THE NEW ORLEANS, MOBILE & CHATTANOOGA Railroad Company. } No. 6304.

Petition.—Filed December 31st, 1870.

To the honorable the judges of the circuit court of the United States, for the fifth judicial circuit and district of Louisiana.

The petition of John Hanning respectfully shows and states that he is an alien, a subject of the Kingdom of Great Britain; that the New Orleans, Mobile & Chattanooga Railroad Company is a corporation incorporated under the laws of the State of Louisiana, domiciled in the city of New Orleans, and is a citizen of the State of Louisiana, and is justly indebted unto your petitioner in the full sum of fifty thousand dollars, ($50,000.00,) for this, to wit:

2 That at the time of the circumstances hereinafter set forth, the said New Orleans, Mobile and Chattanooga Railroad Company were in the occupation of a public wharf on the bank of the Mississippi River, near the foot of St. Joseph street, in the city of New Orleans, and had so negligently removed the planks upon said wharf, and had so negligently laid the planking thereon, contrary to their obligations in the premises, that the petitioner on the 5th day of November, A. D. 1870, while walking across said wharf, though using all proper precaution, was precipitated down an embankment the distance of ten feet, and thereby was injured for life, & disabled from pursuing thereafter any occupation of profit, he being of the age of forty (40) years, the husband of a wife and father of four (4) children, all of whom are dependant upon him for support, and was damaged to the extent of said sum of fifty thousand dollars ($50,000.00.)

That the said injury so suffered by the petitioner was wholly caused by the unlawful and negligent acts of the said New Orleans, Mobile and Chattanooga Railroad Company.

Your petitioner also alleges amicable demand and refusal.

3 Wherefore petitioner prays that the said New Orleans, Mobile and Chattanooga Railroad Company may be cited to appear and answer this petition, and that, after due proceedings had, petitioner may have judgment against the said New Orleans, Mobile & Chattanooga Railroad Company for the said sum of fifty thousand dollars ($50,000.00) and costs, with interest from judicial demand and for all general relief.

(Signed) BILLINGS & HUGHES,
Att'ys for Petitioner.

Citation.

JOHN HANNING
vs.
THE NEW ORLEANS, MOBILE AND CHATTANO'GA Railroad Company. } No. 6304.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon The New Orleans, Mobile and

Chattanooga Railroad Company, a corporation incorporated under the laws of the State of Louisiana, domiciled in the city of New Orleans, a citizen of the State of Louisiana, to comply with the demand of
4 John Hanning, a subject of the Kingdom of Great Britain, contained in the petition of which a copy accompanies this citation, or to deliver its answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against it by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of February, 1871.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 31st day of December, A. D. one thousand eight hundred and seventy, and of the independence of the United States of America the 95th year.

(Signed) D. URBAN, *Clerk.*
By F. B. VINOT, *D'y Clk.*

Marshal's return of service.

Received, January 2d, 1871, by the U. S. marshal, and, on the same day, month, and year served a copy of the within citation and accompanying petition on the within-named New Orleans, Mobile and
5 Chattanooga Railroad Company by delivering the same to J. A. Raynor, president thereof, in person, at the office of said company, in Gallier Court in this city.

New Orleans, Jan'ry 2, 1871.

(Signed) S. W. REED,
D'y U. S. Marshal.

Answer.—Filed January 21st, 1871.

Circuit court of the United States, district of Louisiana.

W'M HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANOOGA R. R. Co. } No. 6304.

The defendants aforesaid, by attorney, come, and for answer to the petition deny all and singular the allegations of the petition, and aver that they are not guilty of the wrongs complained of, as charged therein, and pray a dismissal of the petition, with their costs, against the said plaintiff.

(Signed) J. A. CAMPBELL,
For Defendants.

Peremptory exception.—Filed March 25, 1871.

In the circuit court of the United States.

6 . HANNING
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA Railroad Co. } No. 6344.

The said defendants, by their attorney, come, and for peremptory ex-

ception to the said petition say, that long before the period mentioned in the petition as the date of the happening of the accident to the plaintiff therein complained of, the said defendants were in possession of, as their property, a parcel of levee, with the wharf thereto appurtenant, described therein, and were authorized by the general assembly of the State of Louisiana to enclose and occupy the same for the uses and purposes of the said defendants, and that no steamship or other vessel should occupy or lie at said wharf except with their consent. And the said defendant aver' that from a date prior to the date mentioned in the petition as the time when the accident happened to the plaintiff, to wit, from the first day of July, A. D. 1870, the said property was held by the said defendants as private property, and enclosed and occupied; and that the said defendants did not authorize any vessel to lie at the same or to discharge cargo thereon; but the same was held for the exclu-
7 sive use and benefit of the defendants. And the said defendants further aver that the said plaintiff was not authorized or empowered by them, nor was he invited, licensed, or permitted by them to enter upon the said property, nor to use the same for any purpose whatever. But that the said plaintiff, in his own wrong, and without any authority, permission, or license, at an unseasonable hour of the day, and without the knowledge, consent, or leave of the defendants, went upon the said property without having any business with or invitation from, or any leave or license, and there, without due or proper care, fell into the river and sustained the damage he complains of; and these defendants aver that the said accident was not occasioned by any fault of theirs, or breach of duty to said plaintiff. Wherefore they pray judgment of the petition, and that it may be dismissed with costs.

(Signed) J. A. CAMPBELL, *Att'y.*
Per H. M. SPOFFORD, *For Def'ts.*

Hearing and continuance.

NEW ORLEANS, *Friday*, 31*st March*, 1871.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, presiding judge.

8 JOHN HANNING
vs.
THE NEW ORLEANS, MOBILE AND CHATTANOOGA R. R. Co. } No. 6304.

This cause was called for trial before the court and a jury—Billings & Hughes for pl'ff; J. A. Campbell for defendants—when the following persons were called and sworn on the jury, to wit:

PIERRE CASENAVE.	O. C. BLONDIN.
LEONVILLE AUGUSTIN.	CHA'S DILPIT.
PETER CONWAY.	H. W. JONES.
P. J. HUSSEG.	EMIL RUIZ.
A. COUTURIE.	J. A. TULLY.
E. RELLIEUX.	T. L. SWAIN.

The 8 last-named being chosen as talesmen, by reason of the exhaustion of the list, and the panel being now complete, the trial proceeded; and, after hearing the pleadings and evidence, the cause is continued till to-morrow at 11 a. m., and the jury cautioned not to converse with any one on the subject-matter before them.

Note of evidence.—Filed March 31st, 1871.

JOHN HANNING
vs.
N. O., M. & C. R. R. Co. } No. 6304.

9 Pl'ff offered testimony taken under commission by order of court.

D'rs Tricaud & Holliday, Capt. Wynn and Jno. Maury, sworn for pl'ff.

Defendants offered the evidence of J. O. Noble.

Mr. Kaufman, Geo. Fisher, Mr. Dick, Mr. Carvin, & Mr. Huick sworn for def'ts.

Def'ts offered record No. 1982, 7th dist. court, N. Orl's.

J. S. Thompson & E. C. Billings sworn for pl'ff.

Abraham Bollinger sworn for def'ts.

Order.—April 1st, 1871.

NEW ORLEANS, *Saturday 1st April*, 1871.

Court met pursuant to adjournment.

Present, Hon. W. B. Woods, presiding judge.
" E. H. Durell, district judge.

JOHN HANNING
vs.
NEW ORLEANS, MOBILE AND CHATTANO'GA Railroad Co. } No. 6304

This cause was resumed before the court and jury, and, after
10 hearing the argument of counsel, the court took time to consider the authorities; reserved its instructions to the jury until Monday 10th inst., at 11 a. m.; continued the cause and dismissed the jury until then, and again cautioned the jurors to refrain from conversing with any one with regard to the subject-matter before them.

Submission of cause.

NEW ORLEANS, *Monday, April 10th*, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

JOHN HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA R. R. Co. } No. 6304

This cause was resumed before the court and jury, and after receiving a charge from the court, Aug. Couturie was appointed foreman of the jury and they retired to consider on their verdict—

At 8 p. m. the jury was ordered to be brought before the court, when it appeared there was but little prospect of an agreement.

Whereupon his honor adjourned the court till to-morrow at
11 11 a. m., directed the marshal to keep the jury in charge, and in

case of an agreement during the night, they shall deliver to the clerk a sealed verdict, and be present next morning at the reading of the same.

Mistrial.

NEW ORLEANS, *Tuesday, April 11th*, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

JOHN HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA R. R. Co. } No. 6304.

The jury having remained in deliberation until this day at 2 p. m. without agreeing on a verdict—

It was ordered by the court that they be discharged from the further consideration of the case, and that a mistrial be certified in the premises.

Hearing & continuance.

NEW ORLEANS, *Wednesday, May* 17, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

JOHN HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA R. R. Co. } No. 6304.

12 This cause was called for trial—Billings & Hughes for pl'ff; J. A. Campbell for def'ts, when the following jurors were called and sworn to try the issue.

1. ARISTIDE CAVELIER.
2. J. H. GARDNER.
3. GEO. LARUE.
4. JNO. C. POOLEY.
5. E. H. HARRIS.
6. A. L. TERTROU.
7. A. TERTROU.
8. P. E. DURAND.
9. JOSEPH SWARTZ.
10. FRANK WILLIAMS.
11. SAM'L N. BURBANK.
12. F. E. BERNARD.

And the panel being complete, the trial proceeded, and after hearing the pleadings and evidence the cause is continued till to-morrow at 11 a. m.

Note of evidence.—Filed May 17th, 1871.

J. HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA R. R. Co. } No. 6304.

Pl'ff offered the testimony of himself.

D'r J. P. Tricau sworn for..... Pl'ff.
D'r Holladay " " ..... "

Mr. Carvin " " ..... Def't.
Mr. Coffman " " ..... "
R. H. Barkley " " ..... "
Mr. Dick " " ..... "
" Fisher " " ..... "
Mr. Hinck " " ..... "
13 E. Milmer sworn for ..... Def'ts.
Capt. Davis " " ..... "
Def'ts offered contract "A."
Sargent Wynn " for ..... "
W. Thornton " " ..... "
J. Thompson " " ..... "

Counsel for pl'ff offer the tes'y of Jno. Hanning.
Def't offered plan B & C, & doc't D.

Cause submitted.

NEW ORLEANS, *Thursday, May 18th*, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

JOHN HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA R. R. Co. } No. 6304.

This cause was resumed; and, after hearing argument, and receiving a charge from the court, Frank Williams was appointed foreman of the jury, and they retired to consider on their verdict at half past 3 p. m. His honor adjourned the court, and instructed the jury to deliver to the clerk a sealed verdict in case they should come to an agreement, and that they be present next morning at the opening of the court, at the reading of the same.

14 *Bill of exceptions & doc'ts filed May* 19, '871.

In the circuit court of the United States, district of Louisiana.

JOHN HANNING
vs.
THE NEW ORLEANS, MOBILE AND CHATTANOOGA Railroad Co. } No. 6304.

Be it remembered, that upon the trial of this cause in the circuit court aforesaid, the plaintiff, to maintain the averments of his petition, had introduced testimony; and, after the defendants, to support the issues presented by its pleadings, that is its exception, which was, by agreement, treated as a plea, and its answer, had introduced counter testimony, and after the plaintiff had introduced testimony in rebuttal thereof, all pertinent to the issues between the parties, the defendants, among other evidence, having read the joint resolution of the general assembly of the State of Louisiana, approved March 6, 1869, relative to the said defendants, being No. 67 of the published acts of the session, and is part of this bill of exception, and having produced and read papers purporting to be conveyances of the batture property, which
15 adjoined said wharf, of which the maps hereto attached, marked

B & C, are a description, and having produced and read a copy of a contract which is marked "A," and hereto annexed and made a part of this bill of exceptions; and after argument of counsel for plaintiff and defendant had been concluded, the counsel for plaintiff moved the court to instruct the jury as follows:

Charge of the judge to the jury.

The court charged the following, at the request of the plaintiff:

"If the jury believe that the wharf upon which the accident to plaintiff was caused, had been, since that part of the city was built—that is to say, for a long period of years, in the largest sense, a public place, upon which all people were permitted by law to, and did, come and go at pleasure, and that this state of things continued until and at the time of the accident;

"And if the jury believe that the defendants had not enclosed said wharf, and had omitted, by a fence or otherwise, to notify the public and the plaintiff that they had occupied, or were about to occupy the
16 same for their purposes and uses, or to the exclusion of the public, or that there had been any change in the destination of said wharf, but that the said wharf, so far as appeared, still continued to be a public wharf, and, in fact, the public continued to freely come and go thereon without objection or remonstrance on the part of the defendants, and without any means having been used on their part to notify the public not to come thereon, and that this state of things continued until and at the time of the accident;

"And if the jury believe that the defendants were, at the time of the accident to the plaintiff, either themselves or through Garvin, under the contract introduced in evidence by the defendants, engaged in making repairs upon said wharf, and failed to give to the public and to the plaintiff reasonable notice not to come upon the part so undergoing repairs, and, in consequence of such failure, the plaintiff, while using due caution, met with the accident described in his petition, then the jury will find for the plaintiff."

To which charge the defendants, by their counsel, then and there, before the retirement of the jury, excepted, which exception is
17 allowed, and the court signs and seals this bill of exceptions as evidence thereof.

(Signed) E. H. DURELL, *Judge.*

Instructions moved for by the defendants.

1ST.

First. The court refused this instruction for reasons assigned below:

"If the jury believe that the defendants, at the date of the accident to the plaintiff, occupied and possessed the wharf described in the petition, under the act of the general assembly of March the 6th, 1869, and their titles, and had used it only for the uses and purposes of their own business, and not to collect wharfage, and that prior to this date they had engaged contractors to repair the same, under a contract produced to the jury, who were, with their laborers, repairing the wharf in the ordinary and usual way by removing the planks therefrom, and that the plaintiff, without any business with the defendants or their agents, and without invitation, inducement, or encouragement from the

defendants or the contractor or laborers, but for his own convenience or pleasure, came upon the wharf in the day-time, and while the laborers were visibly employed upon their work, and continued his walk over it, and over the place on the w'arf which was undergoing reconstruction and repair, and fell into the river, he is not entitled to recover of the defendants in this suit.

The court, upon this motion, said:

I refuse to give this charge.

As I stated on the first trial of this case, in which the jury failed to agree, that from the very commencement of our government and prior thereto under the rule of the Spanish power, the banks of the rivers in this State were open to public uses for passage along the banks, and for landing from the river on the shore; and that, when the legislature saw fit to take from the public a portion of the banks of the Mississippi River, and to divert it from public use to the special uses of this company, the defendants in this case, and they having appropriated the same to their own uses, they should have given the public fair notice of it, and notice that they were tearing up the wharf and so forth, prior to so doing; they should have taken the proper pre-
19 caution to give notice that that portion of the banks of the Mississippi had been diverted from the public use to the purposes of the company. They might have done so by enclosing the portion diverted with a proper fence, or by having persons there day and night, to notify any person coming there of the repairs going on; or by putting up large signs to that effect, and the company, taking no such means to give notice to the public that its rights had been taken away with regard to this portion of the highway, and a person coming there and receiving an injury, they are answerable for it in damages.

2ND

2nd. This instruction was also refused for the same reasons as the first. It is—

"If the jury believe that the defendants occupied and possessed the property described in the act of the general assembly of March 6th, 1869, by having enclosed the levee to the bulk-head of the wharf, and had used and employed the wharf exclusively for their own purposes and uses under their title; and had entered into a contract for the reconstruction and repair of the same as shown by the
20 contract produced, and had placed the contractor there, that he might execute the contract, who was, previously to and at the date of the accident to the plaintiff, engaged with his laborers in stripping the wharf of its planks and other timbers, and had rendered the same insecure for use as a wharf;

"And if the jury believe that the plaintiff, at the date of the accident, came upon the wharf in the day-time, when the laborers were so employed, without any business with the defendants, their contractor or employees, and without any invitation, inducement, or encouragement from them, but for his own convenience proceeded to walk over the wharf at the place where it was visibly undergoing repair, and where laborers were visibly employed in their work of stripping the planks from it; when it was easy for him to avoid it by going upon the levee or through the streets of the city, and so fell through the wharf, without any action or agency of the defendants or their servants, he is not entitled to recover."

3RD.

Third. The court gave this instruction conditionally, as expressed in the modifications below. It is—

21 "If the jury believe that the wharf described in the petition was possessed and occupied by the defendants under the act of the general assembly of the 6th of March, 1869, prior to the accident to the plaintiff under that act, and for the uses and purposes of their business only;

"And that prior to, and at the date of, that accident the defendants had employed contractors to reconstruct and repair the same, who were, at the date of the accident, openly and visibly employed in their work upon it; and that the plaintiff came upon the wharf while they were thus employed, without having any business with the defendants, or their agents or employees, and without inducement, invitation, or encouragement from them, but for his own convenience or pleasure, and saw these men at their work; and, while walking, was warned by one of these laborers that the wharf was unsafe, and that his walk was attended with danger, and that he proceeded without taking heed of the warning, and fell into the river from that portion that was then unfinished and incomplete, in consequence of the acts of these contractors, he has no title to damages from the defendants in this suit.

22 The COURT: I will give this instruction, with this addition: In the first place, the company is answerable for the acts of its contractor under the contract, as read to you in this case. In the next place, if it is clearly in evidence that the plaintiff went on to the wharf and was distinctly warned not to go forward by the company, or any of its employees, and that he neglected to heed their warning in that respect, then they are not answerable.

4TH.

Fourth. This instruction was given conditionally, and in connection with the modifications set out below. It is—

"If the jury believe that the defendants were in possession of the wharf and batture under the act of the general assembly of the 6th of March, 1869, and their title, and had enclosed the batture up to the bulk-head, and that, at the date of the accident to the plaintiff, it was under the control of the contractor, under the contract of the 28th of November, 1870, undergoing repairs according to the contract, and

23 that the contractor, in the usual mode of reconstructing wharves, was at that date employed with his laborers in stripping the the planks from the wharf and removing them from the same, and that this was in the day-time, and open and visible to every one, and was observed by the plaintiff at that time, and that the plaintiff, without being connected with the defendants, and having no business with them or their agents, but for his own pleasure, came upon the wharf, and walked over the same without any apparent heed of these facts, or taking any of the precautions suitable to avoid the consequences of them, and disregarded the warning of one of the laborers that there was danger, then, and in this case, the defendants are not liable to him for his damage."

The COURT. I give you this instruction, which, connected with the third instruction, seems to suppose a great many things have been proved of which you are the judges. I refuse the instruction as written

out, except with this addition: That if you believe that the plaintiff went on the wharf in the day-time, and that the employees of the company were then at work repairing the wharf, and that he had fair notice of his danger, and could see his danger by keeping his
24 eyes open; that he was warned by one of the employees, and that, without heeding that warning, or without regarding the instructions of his eye-sight, he stepped upon the open wharf and was damaged, then the company is not answerable.

But if he went on in the day-time, and they gave him no notice, nor had he warning by fences, boards, or signs put up, and went there for business or pleasure, or an idle promenade, and stepped on a plank that was improperly secured, and your conclusion is that said plank was so left by the company, or one of its employees, then the company is answerable for damages.

And to the refusals of the court to give the charges as prayed for on behalf of the defendants, as severally stated above, and to the modifications of those charges as made by the court, and to the charges of the court as given in lieu of the charges prayed for, the defendants, by their counsel, then and there, before the retirement of the jury, excepted, and prays the court to sign & seal this bill of exceptions, and to make the same a part of the record, which is done in term-time, this 19th day of May, 1871.

(Signed) E. H. DURELL, *Judge.*

25 Joint resolution of the general assembly of the State of Louisiana, approved March 6, 1869, No. 67, in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama.

Be it resolved by the senate and house of representatives of the State of Louisiana in general assembly convened, That there be, and is hereby, granted to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama, the right to inclose and occupy for its purposes and uses, in such manner as the directors of said company may determine, that portion of the levee, batture, and wharf in the city of New Orleans, between the street laid out between Pilié street and the Mississippi River, and from Calliope street to the lower line (about three hundred and fifty-five feet below Calliope street) of the batture rights owned by said company; and no steamship or other vessel shall occupy or lie at said wharf, or receive or discharge cargo thereat, except by and with the consent of said company; and all steamships or vessels discharging or receiving cargo at said wharf for said company, or any steamships or vessels using said wharf by and
26 with the consent of said company, and not receiving or discharging cargo at, or occupying any other wharf in the city of New Orleans, shall be exempt from the payment of all levee and wharf dues to the city of New Orleans; said wharf shall be maintained and kept in repair by said company.

Be it further resolved, etc., That all laws and parts of laws, and all ordinances and parts of ordinances conflicting with the provisions of this joint resolution are hereby repealed, so far as they affect the provisions of this joint resolution.

Be it further resolved, etc., That this joint resolution shall take effect from and after its passage.

(Signed) CHA'S W. LOWELL,
Speaker of the House of Representatives.
(") OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved March 6, 1869.
(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy.
(Signed) GEO. E. BOVEE,
Secretary of State.

Exhibit "A" referred to in, and made part of, the foregoing bill of exceptions.

NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD, ENGINEER'S OFFICE,
New Orleans, Nov'r 28th, 1870.

27 Memorandum of agreement made this day by and between Michael Carvin of the first part, and G. W. R. Bayley, div'n eng'r of the N. O., M. & C. R. R. Company of the second part, whereby it is agreed as follows, to wit:

Michael Carvin agrees to furnish the timber, planking, and iron-work, and all the labor necessary for the rebuilding of the N. O., M. & C. R. R. Company's wharf in front of their depot grounds, next below the line of Calliope street, about 350 feet in length, more or less, and the extension of same out to a line with the steamship wharf, next below, with such mooring-posts, cluster-piles for fenders every twenty feet, rows of piles on boundary lines, above and below, slips or inclines as the company, through their engineer, may require, for the sum of forty dollars per square of one hundred square feet, it being understood that only the best quality of twelve-inch square yellow-pine timber shall be used for piles, caps, stringers, fenders, and blocking, and the best of three-inch yellow-pine planks for covering or flooring, such of the old piles as are sound and good to be sawed off and blocks placed thereon, but new caps, stringers, and planking to be used throughout. The old wharf to
28 be made as good as new, and the new wharf in the best workmanlike manner, two hundred feet of wharf, from the lower line, to be completed in two weeks, and the whole within one month from this date.

It is also understood and agreed that the said G. W. R. Bayley, div. engineer of the N. O., M. & C. R. R. Company, shall supervise and direct the work hereby agreed to be done, and that the said work shall be done to his satisfaction.

Payment to be made in currency on the 10th of January, 1871, the company's regular pay-day, at the rate of $40.00 per square for completed wharf, as above specified, on the approval of the estimate or bill for same by said G. W. R. Bayley, div'n engineer.

(Signed) M. CARVIN.
(") G. W. R. BAYLEY.

Witness: GEO. W. ANDREWS.

Exhibits B and C referred to in the foregoing bill of exceptions and made part thereof.

(Here follows two maps, marked page 28.)

29 *Verdict.*

NEW ORLEANS, *Friday, May* 19, 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

JOHN HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA R. R. Co. } No. 6304.

The jury having delivered to the clerk a sealed verdict, and being now present in open court, the same was opened and read, and it is in the following words, to wit: The verdict of the jury in this case is, that the plaintiff recover from the defendants, as damages, the sum of ten thousand dollars.

May 18th, 1871.

(Signed) FRANK WILLIAMS, *Foreman.*

Whereupon it is ordered that the same be recorded.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that John Hanning do recover from the defendant, The New Orleans, Mobile & Chattano'ga Railroad Company, the sum of ten thousand dollars as damages and costs of suit.

30 *Judgment.*

United States circuit court. Fifth circuit and district of Louisiana. April term, 1871.

NEW ORLEANS, *Friday, May 19th,* 1871.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

JOHN HANNING
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA R. R. Co. } No. 6304.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that John Hanning do recover from the defendant, The New Orleans, Mobile and Chattano'ga Railroad Company the sum of ten thousand dollars as damages and costs of suit.

Judgment rendered May 19, 1871.

Judgment signed May 24, 1871.

(Signed) E. H. DURELL, *Judge.*

Petition and order for writ of error.—Filed May 22, 1871.

31 Circuit court of the U. S. May, 1871. District of Louisiana.

JOHN HANNING, PL'FF,
vs.
NEW ORLEANS, MOBILE & CHATTANO'GA Railroad Co., def't. } No. 6304.

The defendants in this cause respectfully represents to the judges of

circuit court aforesaid, that they are aggrieved by the judgment rendered in this cause against them, and pray the court for a writ of error to the Supreme Court of the United States, returnable to the next regular term of the Supreme Court, aforesaid, and for a supercedeas of the execution, & for that purpose they pray the court to fix the amount of the bond to be given.

(Signed) J. A. CAMPBELL,
Att'y for Def'ts.

MAY 22, 1871.

Order.

A writ of error, to operate as a supersedeas, is allowed in this case, as prayed for, returnable to the Supreme Court of the U. S. at its next regular term, the plaintiffs in error giving bond in the sum of $20,000, with security according to law.

May 22, 1871.

(Signed) E. H. DURELL, *Judge.*

32 *Bond for writ of error.—Filed May 26th*, 1871.

Know all men by these presents that we, The New Orleans, Mobile and Chattanooga Railroad Company, now known by the name of the New Orleans, Mobile & Texas Railroad Company, as principal, and Peter R. Middemiss and Michael Carvin, as sureties, are held and firmly bound unto John Hanning, each in the full and just sum of twenty thousand dollars, to be paid to the said John Hanning, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 26th day of May, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein John Hanning is plaintiff, and The New Orleans, Mobile & Chattanooga Railroad Company, now The New Orleans, Mobile & Texas Railroad Company, as defendants,
33 judgment was rendered against the said defendants, and the said defendants having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said John Hanning, plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said corporation shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

The New Orleans, Mobile & Texas Railroad Company,
By JAMES A. RAYNOR, [L. S.]
President.
M. CARVIN. [L. S.]
P. R. MIDDEMISS. [L. S.]

Sealed and delivered in the presence of—
(Signed) J. J. WILLIAMSON.
J. J. WILLIAMSON.

34 (Endorsed on back:)

Peter R. Middemiss and Michael Carvin, sureties on the within bond, being duly sworn, say that they are worth each the sum of twenty thousand dollars over and above all their debts and liabilities.

(Signed) P. R. MIDDEMISS.
" M. CARVIN.

Sworn to & subscribed before me this 26th day of May, 1871.
(Signed) F. B. VINOT, *D'y Clk.*

35 UNITED STATES OF AMERICA,
Circuit court of the United States,
Fifth circuit and district of Louisiana:

CLERK'S OFFICE.

I, Dominick Urban, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 34 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of John Hanning vs. The New Orleans, Mobile and Chattano'ga Railroad, now known by the name of The New Orleans, Mobile and Texas Railroad Company, No. 6304 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 12 day of June, A. D. 1871.

[SEAL.] D. URBAN, *Clerk.*

[5-c't int. rev. stamp, canceled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Dominick Urban, whose name is signed to the above certificate, as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district this 12 day of June, A. D. 1871.

E. H. DURELL, *Judge.*

[5-c't int. rev. stamp, canceled.]

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or one of you, between John Hanning and the New Orleans, Mobile and Chattanooga Railroad Company, now called The New Orleans, Mobile & Texas Railroad Company, a manifest error hath happened to the great damage of the said New Orleans, Mobile & Chattanooga Railroad Company, now called the New Orleans, Mobile and Texas Railroad Company, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 26 day of May in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.]

D. URBAN.
Clerk of the United States Circuit Court
for the District of Louisiana.

37 (Indorsed:) United States circuit court. No. 6304. The New Orleans, Mobile & Chattanooga Railroad Company, now called The New Orleans, Mobile & Texas Railroad Company, pl'ffs in error, versus John Hanning, defendant. Writ of error. Filed May 26th, 1871. F. B. Vinot, d'y cl'k.

38 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to John Hanning, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a petition & a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein The New Orleans, Mobile and Chattanooga Railroad Company, now known by the name of The New Orleans, Mobile and Texas Railroad Company, are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said petition & writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first day of June, in the year of our Lord one thousand eight hundred and seventy-one.

E. H. DURELL, *Judge.*

39 (Indorsed:)
United States circuit court. No. 6304. The New Orleans, Mobile & Texas Railroad Company, plaintiffs in error, vs. John Hanning, defendant. Citation.

Marshal's return.

Received Jun' 1, 1871, by the U. S. marshal, and on the 23rd day of June, 1871, served a copy hereof on John Hanning, defendant, by handing the same to A. D. B. Hughes, attorney of record for said Hanning, in person, in this city.

June 27th, 1871.

S. W. REED,
D'y U. S. Marshal.

On this 27th day of June, 1871, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation, as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to and subscribed before me.

F. B. VINOT, *D'y Clk.*

(Indorsement on cover:) No. 387. The New Orleans, Mobile and Chattanooga Railroad Company, now called The New Orleans, Mobile and Texas Railroad Company, plaintiffs in error, vs. John Hanning. Louisiana C. C. U. S. Filed 18 November, 1871.

Supreme Court of United States

NEW ORLEANS, MOBILE AND TEXAS RAIL ROAD COMPANY,

PLAINTIFFS IN ERROR,

vs.

JOHN HANNING.

Brief for Plaintiffs in Error.

JOHN A. CAMPBELL,
DUNCAN G. CAMPBELL,
Attorneys.

MURPHY & CO., PRINTERS, BALTIMORE.

Supreme Court of United States.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY

vs.

JOHN HANNING.

In Error to the Circuit Court of the United States for the District of Louisiana.

This action was begun by the defendant, Hanning, to recover damages for an injury done to his person by a fall through a wharf in the City of New Orleans, upon which he avers he was walking and exercising due care. The wharf is stated to be the property of the plaintiffs in error, a Corporation established for the construction of a railroad from points in Alabama to New Orleans, and thence into Texas.

The defence of the Corporation was by exception and answer; their defence was, that the wharf was not a *public wharf*, that the defendant, Hanning, came upon the same without *business*, *invitation*, or *inducement*, and that his fall was the result of his own inattention, and was not occasioned by any fault of theirs, or any breach of duty towards him. There was likewise a general denial of the facts stated in the petition. A verdict was rendered in

favor of the defendant, (Hanning) and the case now comes before this Court upon exceptions taken during the progress of the trial.

The Corporation proved their title to the wharf and their authority to use it for the "purposes of their business." The Act of the Legislature conferring upon the Corporation the use and occupation of the wharf is to be found on page 10 of the record, and the accompanying maps are designed to show the position of the property. There is also included in the record, page 11, a contract for the repair of the wharf. None of the testimony is given, but it is stated that there was testimony introduced pertinent to the issues joined. Both parties moved for instructions and exceptions were taken to the charges of the Court and to the refusals to charge as requested by the Corporation.

We submit for error the following charge of the Court. (Rec. page 7.)

1st. "And if the jury believe that the wharf upon which the accident to the plaintiff was caused, had been, since that part of the city was built, that is to say, for a long period of years in the largest sense, a public place upon which all people were permitted by law to go, and did come and go at pleasure, and that this state of things continued till and at the time of the accident. And if the jury believe that the defendants had not enclosed said wharf and had omitted by a fence or otherwise to notify the public and the plaintiff that they had occupied, or were about to occupy, the same for their purposes and uses, or to the exclusion of the public, or that there had been any change in the destination of said wharf, but that the said wharf, so far as appeared, still continued to be a public wharf, and in fact, the public still continued to freely come and go thereon, without objection or remonstrance on the part of the defendants and without any means having been used on their part to notify the public not to come thereon, and that this state of things continued until and at the time of the accident; and if the jury believe that the de-

fendants were at the time of the accident to the plaintiff, either themselves or through Garvin, under the contract introduced in evidence by the defendants, engaged in making repairs upon said wharf and failed to give to the public and to the plaintiff reasonable notice not to come upon the part so undergoing repairs, and in consequence of such failure, the plaintiff while using due caution met with the accident described in his petition, then the jury will find for the plaintiff."

We assign for error the following instruction prayed for by the plaintiffs in error, and refused by the Court.

2d. "If the jury believe that the defendants, at the date of the accident to the plaintiff, occupied and possessed the wharf described in the petition under the Act of the General Assembly of March 6th, 1869, and their titles, and had used it only for the uses and purposes of their own business, and not to collect wharfage; and that prior to this date they had engaged contractors to repair the same under a contract, produced to the jury, who were with their laborers repairing the wharf in the ordinary and usual way by removing the planks therefrom; and that the plaintiff without any business with the defendants or their agents, and without any inducement or encouragement from the defendants, or contractors, or laborers, but for his own convenience or pleasure came upon the wharf in the day time, and while the laborers were visibly employed upon their work, and continued his walk over it and over the place on the wharf which was undergoing reconstruction and repair, and fell into the river, he is not entitled to recover of the defendants in this suit."

3d. We assign for error the charge of the Court in response to the foregoing prayer.

"As I stated upon the first trial of this case in which the jury failed to agree, that from the very commencement of our

Government, and prior thereto, under the rule of the Spanish power, the banks of the rivers in this State were open to the public uses along the banks, and for landing from the river on the shore: and that when the Legislature saw fit to take from the public a portion of the banks of the Mississippi River, and to divert it from public use to the special uses of this company, the defendants in this case, and they have appropriated the same to their own use, they should have given the public fair notice of it, and notice that they were tearing up the wharf, and so forth, prior to so doing: they should have taken the proper precaution to give notice that that portion of the banks of the Mississippi had been diverted from the public use to the purposes of the company. They might have done so by enclosing the portion diverted with a proper fence, or by having persons there by day and night, to notify any person coming there, of the repairs going on, or by putting up large signs to that effect, and the company taking no such means to give notice to the public that its rights had been taken away with regard to this portion of the highway, and a person coming there and receiving an injury, they are answerable for it in damages."

4th. We assign for error the refusal to give the 2d instruction moved for, which is as follows:

"If the jury believe that the defendants occupied and possessed the property described in the Act of the General Assembly of March 6th, 1869, by having inclosed the levee to the bulkhead of the wharf, and had used and employed the wharf exclusively for their own purposes and uses under their title, and had entered into a contract for the reconstruction and repair of the same, as shown by the contract produced, and had placed the contractor there that he might execute the contract, who was, previously and at the time of the accident to plaintiff, engaged with his laborers in stripping the wharf of its planks and other timbers, and had rendered the same insecure for use as a wharf;

and if the jury believe that the plaintiff, at the date of the accident came upon the wharf in the day time, when the laborers were so employed, without any business with the defendants, their contractor or employés, and without any invitation, inducement or encouragement from them, but for his own convenience proceeded to walk over the wharf at a place where it was visibly undergoing repairs, and where laborers were visibly employed in their work of stripping the planks from it, and where it was easy for him to avoid it by going upon the levee or through the streets of the city, and so fell through the wharf without any action or agency of the defendants or their servants, he is not entitled to recover."

5th. We assign for error the refusal to give the 3d instruction prayed for, as follows:

"If the jury believe that the wharf described in the petition was possessed and occupied by the defendants under the Act of the General Assembly of the 6th of March, 1869, prior to the accident to the plaintiff under that Act, and for the uses and purposes of their business only; and that prior to and at the date of that accident the defendants had employed contractors to reconstruct and repair the same, who were at the date of the accident, openly and visibly employed in their work upon it; and that the plaintiff came upon the wharf while they were thus employed, without having any business with the defendants, their agents or employés, and without inducement, invitation or encouragement from them, but for his own convenience or pleasure, and saw these men at their work; and while walking was warned by one of these laborers that the wharf was unsafe, and that he proceeded without taking heed of the warning, and fell into the river from that portion that was then unfinished and incomplete in consequence of the acts of these contractors, he has no title to damage from the defendants in this suit."

6th. We assign for error the charge given at page 9, as follows:

"The Court: I will give this instruction with this addition: In the first place, the company is answerable for the acts of the contractor under the contract as read to you in this case."

7th. We assign for error the refusal to give the 4th instruction as moved for, as follows:

"If the jury believe that the defendants were in possession of the wharf and butture under the Act of the General Assembly of the 6th of March, 1869, and their title, and had enclosed the butture up to the bulkhead, and that at the date of the accident to the plaintiff, it was under the control of the contractor under the contract of the 28th of November, 1870, undergoing repairs according to the contract, and that the contractor, in the usual mode of reconstructing wharfs, was, at that date, employed with his laborers in stripping the planks from the wharf and removing them from the same, and that this was in the day time and visible to every one, and was observed by the plaintiff at that time, and that the plaintiff without being connected with the defendants, and having no business with them, or their agents, but for his own pleasure came upon the wharf and walked over the same without any apparant heed of these facts, or taking any precautions suitable to avoid the consequences of them, and disregarded the warnings of one the laborers that there was danger there, and in this case, the defendants are not liable to him for his damage."

8th. We assign for error the instruction given by the Court on pages 9—10, as follows:

"I give this instruction which, connected with the third instruction, seems to suppose a great many things have been proved of which you are the judges. I refuse the instruction, except with this addition: That if you believe that the plaintiff

went on the wharf in the day time, and that the employés of the company were then at work repairing the wharf, and that he had fair notice of his danger, and could see his danger by keeping his eyes open, and that he was warned by one of the employés, and that without heeding that warning, or regarding the instructions of his eyesight, he stepped on the open wharf and was damaged, then the Company is not answerable.

"But if he went on in the day time, and they gave him no notice, nor had he warning by fences, boards, or signs put up, and went there for business, or pleasure, or an idle promenade, and stepped upon a plank that was improperly secured, and your conclusion is, that said plank was so left by the company, or one of its employés, then the company is answerable for damages."

From the foregoing prayers and instructions it will be perceived that the propositions maintained by the Court were: 1st that whereas prior to the Act of the General Assembly of March 6th, 1869, which authorized the corporation to inclose "a portion of the levee, butture and wharf for their own uses and purposes in such manner as the directors of the company may determine," the levee and butture were public places, and as such, free to all persons to go and come for any and all purposes, it became incumbent upon the corporation to afford some specific and particular notice to the public, that a change had taken place in the destination and use of the property. That the occupation and possession, enclosure of the butture and the employment of a contractor to repair the wharf, would not be sufficient to relieve the corporation from liability for an injury to a casual visitor who came upon the property without business, invitation, or inducement, or even for an idle promenade.

2d. That the corporation was liable for the default of the contractor, although they had delivered over the wharf to him to be repaired, and he was visibly and openly making repairs at the time Hanning came upon it without business, license, or inducement.

The first and second prayers for instructions by the corporation present their case independently of the contract with Garvin, and of their liability for his acts or omissions. The third and fourth prayers and the replies of the Court present the same questions involved in the first and second, with the additional one of the exemption of the corporation on account of the acts and omissions of the contractor. We will consider these questions separately.

I. It is admitted that by the Civil Code of Louisiana a servitude of public utility is reserved upon the banks of all of the navigable waters within the State, and that under it all persons may use the banks of such waters freely for the landing of vessels, deposit of goods, drying of nets, &c., &c. C. C. art. 443. 446—449. This servitude within the limits of the City of New Orleans is under the administration of the corporate authorities, who by their charter are empowered to collect wharf and levee dues, and other charges established by law, from persons having occasion to use the banks of the Mississippi river, and on their part, they are under the obligation to keep such public places in a suitable condition for public use as a quay.

But this condition of public use ceased with the adoption of the joint resolution of the 6th of March, 1869, and the occupation of the wharf by the railroad company, under their title, to the fee simple and the license conferred by the said resolution. This Act of the Legislature discharged the land of the reserved public servitude, and authorized the corporation, as riparian owners, to maintain a wharf in their front for their own uses and purposes, in such manner as the board of directors might determine. Changes in the destination of public property are not infrequent in the State; and the Legislature has frequently disposed or public servitudes in a manner similar to the present.

5 La. Ann. 561; 15 La. Ann. 577; 13 La. Ann. 129; 22 La. Ann. 545. The Statutes of the State are promulgated in a manner prescribed by law, and after such promulgation, no one is heard to plead ignorance of them. C. C. Art. 5–7. It is not alleged that the forms of law were not complied with in reference to this act.

The act, therefore, of the defendant, Hanning, in coming upon this property without any business relations with, or invitation, or inducement from the corporation, was a trespass; for we know of no law, custom or usage which requires a proprietor to maintain fences, sign-boards, enclosures or sentinels about his property.

Addison, in his work on Torts, (chap, 6, section I,) says: "If a man's land is not surrounded with an actual enclosure, the law encircles it with an imaginary barrier, which to pass, is to break and enter his close."

We understand the obligation of a wharfinger, warehouseman, or other person having business with others to keep his place of business in a proper condition for the work and intercourse he invites or expects. In the case of Carleton and others *vs.* Franconia Iron and Steel Company, (99 Mass. 216,) the circumstances under which the liability attaches in such cases is thus stated by the Court: "The owner or occupant of land is liable to those coming on it, using due care, at his invitation or inducement, express or implied, or on any business to be transacted with him, or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice." And again, the Court say in the case of Bolch *vs.* Smith, 7 Hurls. & Norman, 736: "A mere passive acquiescence by the owner or occupier, in a certain use of his land by others, involves no liability; but if he directly, or by implication, induces others to pass over his premises, he thereby assumes an obligation that they are in a safe condition for such use."

In the case of Sweeney *vs.* O. C. & N. Railroad Company, 10 Allen, Mass. Rep. 386, the Chief Justice says: "In order to maintain an action for injury to person or property, by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. This is the basis upon which the cause of action rests." * * * "An owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, express or implied, by which they may have been led to enter thereon. A mere naked license, or permission to pass over an estate, will not create a duty or impose an obligation on the part of the owner or person in possession, to provide against the accident. The gist of the liability consists in the fact that the party injured did not merely, for his own convenience and pleasure, and from motives to which no act or sign of the owner contributed, but that he was led to believe that they were intended to be used by visitors or passengers, and that such use was acquiesced in by the owner or person in possession of the premises, but that it was in accord with the intention or design with which the way or place was prepared or allowed to be used."

To the same effect are also the cases of Elliott *vs.* Pray, 10 Allen, Mass. 278; Zoebisch *vs.* Tarball, 10 Allen, 385; Hounsell *vs.* Smith, 97 C. B. (N. S.) 729, 14 Md. Rep. 227, 16 C. B. 741; Chapman *vs.* Routhwell, E. B. & C. 168; Gautret *vs.* Egerton, 2 Law Jr. Rep. (N. S.) Common Pleas, 371; Indemaur *vs.* Dames, Ib. 311; Nicholson *vs.* Erie R. R. Co., 41 N. Y. 530; Southcote *vs.* Stanley, 1 Hurls & Norm. 249; Wilkinson *vs.* Fairie, 1 Hurls & C. 633; Sullivan *vs.* Waters, 14 Irish Common Law Rep. 460. The instructions refused by the Court were, 1st. the ownership of the property unaffected by the public servitude; 2d. the occupation of the wharf by a contractor visibly engaged in stripping the wharf of its planks and rendering it unfit for

use as a wharf; 3d. the fact that Hanning had neither business, invitation nor inducement to come upon the wharf; at least there is no affirmation that he had any.

The Court answers the case presented by affirming that the wharf had for a long period of time been a public one, upon which the public had been free to come and go at will, and that the defendant, Hanning, had no notice that there had been a change in its destination. The Court does not take into consideration in fact, it discards from its consideration any duty on the part of the defendant to inquire into the title to the property, of its condition, or of his own responsibility to himself to mark well where the prints of his feet were made. The facts visible to him were of themselves sufficient to put him upon his guard, and to invite inquiry as to his whereabouts. He saw an enclosure of the levee, and a railway passing over a portion of it, and parties engaged in stripping the wharf of its timbers, and things in confusion about him; common sense, one would think, would have told him as readily as a sign board, that such localities were dangerous and to be avoided. There were public streets near by, over which he could walk, but he prefers to go where he had neither business nor invitation, and having met with an accident in the pursuit of his whim or curiosity, he asks of this Corporation to indemnify him for his injuries, as if it were their duty to provide him with a suitable promenading place over their lands.

II. The third and fourth prayers for instructions and the answers of the presiding judge to them, will next be considered. All the questions presented in the first and second prayers for instructions are to be found in these. They present, however, an additional ground upon which the plaintiffs claim exemption from all liability for the injury done to the defendant. The record shows that Garvin, at the time of the accident, had possession of the wharf under a construction contract with the

railroad company, (page 11 Record,) and was engaged in removing the planks in fulfilment of the said contract. The Court replied to the third prayer that the Corporation was liable for the acts or omissions of Garvin. And to the fourth prayer the answer was, that if Hanning "went to the wharf in the day time, and they gave him no notice, nor had he any warning by *fences* or sign *boards* put up, and *went* there for *business* or PLEASURE, or AN IDLE PROMENADE, and *stepped on a plank, that was improperly secured*, and your conclusion is, that the said plank was so left by the Company OR ONE OF ITS EMPLOYÉS, THEN THE COMPANY IS *answerable in damages.*"

The necessity of positive and direct notice is insisted on, and the liability of the Corporation for the contractor is declared.

We shall not examine the question whether the Corporation were obliged to warn or admonish the defendant, or had any active duty to perform towards him, or whether the charge of the Court can he sustained upon the degree of diligence that was needful in such a case. This has already been considered in the first division of this question. We, however, deny all liability on the part of the corporation for the negligence of Garvin and his employés, and all responsibility for their acts.

By the Act of the General Assembly, passed January 21st, 1870, (No. 31, page 75 of the Session Acts,) the liability of this Corporation is defined in a number of cases. The second section of the Act declares: "That the said Corporation, its officers or employés, shall not in any case be liable for any debts contracted or liabilities incurred by any person or persons who shall have contracted, or who shall contract with it to *construct, any portion of its road, buildings* or *appurtenances*, or its *rolling stock*, or to *furnish any materials or labor to be used for such construction*, or *for its maintenance or operation.* NOR SHALL SAID COMPANY, ITS OFFICERS *or employés, be liable for any injury to person or property, or loss of life, which shall be caused by any act or omission of any person or persons so contracting with it, or any of his or their employés or agents.*"

The wharf and butture back of it, are in front of the depot grounds of the Corporation, and are at the termination of the eastern line of the ferry across the Mississippi river; as will appear from the Acts of the Legislature. The construction of the wharf was a stage in the construction of the road. Sec. 5, Acts of 1870, page 57. Sec. 2, Acts of 1868, page 31.

The prayer for the instruction to the jury refers directly to the acts and omissions of this contractor as the cause of the condition of the wharf and place when the accident occurred. The Court to the third instruction answers: "The Company is answerable for the acts of its contractor, under the contract as read to you in this case." The Judge also distinctly informs the jury that if the insecurity of the planks arose from the act of the plaintiffs or their employés, they are responsible. The Statute is precise upon this subject.

The Statute does no more than affirm the rule of law that has been laid down by the courts in England, and which is gradually gaining a complete supremacy over the courts of the different States of this Union.

Addison in his work on Torts (page 395) says: "The general rule is, that the person injured by the negligence of another, cannot go beyond the person who actually did him the injury unless he can establish that the latter stood in the relation of a servant to the defendant, or that the injury was the result of some *specific order given* by the defendant. * * * * Endeavors have been made to hold all parties liable from whom the act ultimately originates, but it has been held that if the act ordered to be done can be lawfully done without injury to others, the act of the person personally engaged in doing the mischief is not the act of the person who set him in motion, unless the relationship can be established between them."

We also quote from the same author that; "although a person has ordered or directed a particular thing to be done, yet if he does not employ his own servants and workmen to do it, but

trusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion over it and control of the workmen engaged in the work, he is not responsible for the injuries done to third persons by the negligent execution of the work."

In the case of Gray *vs.* Pullen, 32 Law Journal Rep. (N. S.) Common Law p. 160, Chief Justice Cockburn says: "There is nothing in this case to prevent the application of the *common doctrine* that if a person in the exercise of his rights as a private individual, or those conferred upon him by statute, employs a contractor to do the work, and the latter is guilty of negligence in doing it, the contractor and not the employer is liable."

The following English cases are to the same effect: Butler *vs.* Hunter, 9 Hurls & Norman, 826; Robson *vs.* Cubit, 9 Mason & Welby, 710; 3 H. & C. 11; Daniel *vs.* Metropolitan R. R. Co., 32 Law Times Reports (Aug., 1871,) N. S.; Opinion of Lord Westbury, 519; Reedie *vs.* London & Northeastern R. R. Co., 4 Ech. 243; 16 Common Bench 550; 16 L. & E. 442; Milligen *vs.* Wedge, 12 A. & E. 737; 13 C. B. 182; Allen *vs.* Haywood, 7 A. & E. (N. S.) 900; Quarman *vs.* Burnett, 6 M. & W. 499.

In the case of Painter *vs.* City of Pittsburg, 46 Penn. 220, Mr. Justice Strong, the organ of the Court, after commenting upon several English cases, says, "Such also we understand to be the doctrine in this country, sustained by a decided predominence of authorities."

"It would answer no good purpose to review the cases at length. The English ones, and many of the American ones, are reviewed and commented upon in Hilliard *vs.* Richardson, 3 Gray, 359; Barry *vs* City of St. Louis, 17 Missouri, 121; Blake *vs.* Ferri, 1 Selden, 48. The general principle to be extracted from them is, that a person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them: that when an injury is done to a person exercising an

independent employment, the party employing him is not responsible to the person injured." Pittsburg R. R. Co. *vs.* Evans, 53 Penn. 250; Hilliard *vs.* Richardson, 3 Gray, 359; Scammon *vs.* City of Chicago, 25 Ill. 425; Pack *vs.* Mayor of N. York, 4 Selden, 222; 28 Vermont, 103—297; 4 E. D. Smith, 1 Redfield on Railways, chap. 20, p. 506; 17 Missouri, 121; Cuff *vs.* Newark & N. Y. R. R. Co., 9 Am. L. Reg. 441; Blake *vs.* Ferris, 1 Selden, 48. Nor will the reservation of the power to supervise or to inspect the work, throw the liability upon the employer. 1 L. & E. R. 477; Steel *vs.* S. R. R. Co. 32 L. & Eq. 366; Painter *vs.* City of Pittsburg, 46 Penn. 220.

The Louisiana Code contains very general and undefined declarations in reference to such liabilities. They affirm the liability of an undertaker for his servants. C. C. 2739, 2296, 2299. The decisions of the courts incline to relieve the employer, unless he actually controls or directs the work. Peyton *vs.* Richards, 11 Ann. 62.

Article 1384 of the Code Napoleon: "Les Maitres et les commettants sont responsables du dommage causé par leurs domestiques et préposés dans l'exercise actuel des fonctions auxquelles ils les ont employés," is identical with article 2299 of the Code of Louisiana, and the French lawyers, in construing this article, have held that in order to make the "commettant" responsible for the acts of the "préposé," the latter must be acting, "sous les ordres, sous la direction et sous la sourveilliance du commettant." Dalloz Jurisprudence Génèrale verbo Rêsponsabilité, chap. III, sec. 2, art. 5; Teston *vs.* Salles and Mining Co. of Grande Combe; N. R. R. Co. of France *vs.* Boisseau; Administration of Forests *vs.* Martin, (cited in Dalloz;) Serandet *vs.* Saisse, Law J. Rep., vol. 1, Privy Council Appeals, page 151. The legislative enactment of the 21st of February, 1870, before referred, was designed to define the liability of this Corporation in such cases, and it has exonerated it for the acts and omissions of their contractors. We conclude that the Corpora-

tion is not liable for an injury to the person of one who, having no business with them, or inducement or invitation to come upon their property, came upon it for exercise or an idle promenade, and coming upon it, found it in disorder and insecurity, from the acts of a contractor engaged in repairing and reconstructing it, and without any agency on the part of the Corporation, fell through the flooring.

JOHN A. CAMPBELL,
DUNCAN G. CAMPBELL,
Attorneys for Plaintiffs.

IN THE

Supreme Court of the United States.

December Term, 1872.

THE NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY, PLAINTIFF IN ERROR,
vs.
JOHN HANNING.

No. 155.

Brief of Counsel of Defendant in Error.

FIRST.

This was a case in which the plaintiff in the court below, an alien, claims from the defendant, a citizen of Louisiana, fifty thousand dollars damages for injuries sustained in falling from a wharf occupied by the defendants in the city of New Orleans, on the bank of the Mississippi river, where the company, in violation of their duty, had so negligently removed certain planks and had so negligently placed others that plaintiff, though using all proper precaution, while walking across said wharf was precipitated down an embankment and received injuries of a permanent character.

See petition, Rec., p. 1.

The defence was that the company was in possession of the wharf as owner, and had been authorized by law to enclose and occupy it, which they had done; that plaintiff had no leave or license from them to go upon the wharf, but went there, in his own wrong, at an unseasonable hour,

and without due or proper care, fell into the river and sustained the injuries complained of.

See Rec., p. 3.

There was a verdict and judgment in favor of plaintiff against the company for $10,000, and the latter has brought the case here.

See Rec., p. 12.

The company had been authorized by an act of the legislature of Louisiana, approved March 6, 1869—to be found in the acts of that year at page 67—to enclose and occupy, for its purposes and uses, and in such manner as the directors of the company might determine, a portion of the levee, batture, and wharf on the river Mississippi, in front of New Orleans. The act provided that no vessels of any kind should lie or discharge at the wharf without the consent of the company. The act placed no other restriction upon its use.

The company was bound to maintain the wharf and keep it in repair.

It seems the company entered into a contract with Michael Carwin for rebuilding the wharf. The contract is given in full in the bill of exceptions, and is found at p. 11 of the record.

The contract contains a provision that G. W. R. Bayley, the engineer of the company, who contracted on its behalf, "shall supervise and direct the work hereby agreed to be done, and that the said work shall be done to his satisfaction."

Mr. Carwin was the agent of the company, who were then liable for his negligence or want of skill, as well as for their own.

See Camp *vs.* Wardens, &c., 7 Louisiana Annual Reports, pp. 322 and 326.

See Story on Agency, § 452 *et seq.*

The wharf which was then being repaired had always been a public place.

The civil law, as it prevailed in Louisiana, preserved the use of the banks of navigable streams to the public.

See Code of Louisiana of 1808, p. 96, art 8; p. 128, art. 13.

See La. Code of 1824, arts. 446 and 661.

See Munic'y No. One *vs.* Munc'y No. Two, 12 Louisiana (Curry's) Reports, p. 49; Pully *vs.* Munc'y No. Two, 18 Louisiana (Curry's) Reports, p. 278; Shepherd *vs.* Third Munic'y of N. O., 6 Robinson La. Reports, p. 349.

Under this state of the law of the *locus in quo* it was perfectly right for the judge to charge the jury as found in the bill of exceptions on page 7 of the record. It was clearly the duty of the company to give warning to the public by designating the limit at which their occupancy commenced; they had the right to enclose and occupy, and not enclosing, they made it impossible for the plaintiff to know which part of the wharf was used by them.

There were four instructions asked for by the company, which the court below refused.

On pp. 7 and 8 of the record may be found the first and second instructions asked, with the reasons of the court for refusing.

The court was asked, in substance, to charge that if the jury found the company was in the occupancy and possession of the wharf under the act of the Louisiana legislature, (at page 10 of the record,) and had prior to the date of the accident engaged contractors to repair it under the contract, (at page 11 of the record,) who, with their laborers, were repairing the wharf in the usual way by removing the planks from it, and that plaintiff, without any business with

defendants or their agents, and without invitation, inducement, or encouragement from the defendants or the contractors or laborers, but for his own convenience or pleasure, came upon the wharf, in the day time, and while the laborers were visibly employed upon their work, and continued his walk over it, and over the place on the wharf which was undergoing reconstruction and repair, and fell into the river, he is not entitled to recover.

The court refused to give the charge in such form, and charged that as the wharf had by law always been free and open to the public, that when the legislature gave to the company the right to occupy it, then it was the duty of the company to take means to warn the public that its rights had ceased, so that persons might avoid going upon it, and that as the company had neglected to take any precautions in this respect, they were liable for the damage.

In this ruling the judge of the court below was clearly right.

The *locus* granted by the legislature had always been public; the grant was made to the grantee on condition he should *enclose* and occupy it for his purposes and uses, and with the obligation to maintain and keep the wharf in repair.

The grantee was to change the normal condition of affairs as it had existed from time immemorial. Had there been, then, no obligation upon him to enclose so as to keep all persons out, which he failed entirely to do, he would, nevertheless, have been bound to take such measures as would indicate to every one the change.

It was the act of repairing the wharf which produced the accident, and it was the duty of the company in making the repairs to take every reasonable precaution to prevent accidents.

See Corby *vs.* Hill, 4 J. Scott, Common Bench, N. S., p. *565.

See Williams *vs.* Groncott, 4 Best & Smith, pp. *155 *et seq.*

Had the company enclosed the space, as they were bound by law and the terms of the grant to do, with a proper fence, the accident could not have happened.

The third and fourth charges seem to be entirely favorable to the company, (see Rec., pp. 9 and 10,) for they instruct the jury that if there was any contributory negligence on the part of the plaintiff below, if he was warned of danger, where he was going, and did not heed the warning, he could not recover, and the question whether such warning was given or not was properly left for the jury.

It is respectfully submitted there is no error here, and that the judgment should be affirmed.

THOMAS J. DURANT,
For Defendant in Error.